NO. 41892-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LEIGH ANN SHOFFNER,

Appellant,

v.

STATE OF WASHINGTON and VICTORIA RAPID TRANSIT, INC., a Washington for-profit corporation,

Respondents.

BRIEF OF RESPONDENTS STATE OF WASHINGTON AND VICTORIA RAPID TRANSIT, INC.

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I. INTRODUCTION

Respondents State of Washington (hereafter WSF) and Victoria Rapid Transit, Inc. (hereafter VRT) respectfully request that the Court of Appeals affirm the trial court's order dismissing Leigh Ann Shoffner's maritime cause of action for negligence, unseaworthiness, maintenance, cure, and unearned wages.

It is undisputed that Ms. Shoffner's injury occurred before she reported to work by boarding her vessel at the Lofall Terminal on Hood Canal. Ms. Shoffner alleges that her accident occurred while she was walking down a Kitsap County sidewalk, adjacent to a Kitsap County street, approximately 300 feet from the fenced Lofall dock area where her vessel was moored.

In her opening brief, Ms. Shoffner cites *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724, 63 S. Ct. 930, 87 L. Ed. 1107 (1943) as authority for reversal. Appellant's Opening Brief at 1. (Appellant's Br.) *Aguilar* is not in point. Ms. Shoffner is a brown-water, commuter seaman. Aguilar was a blue-water, ocean-going seaman. Ms. Shoffner lived not in the "confines of the ship" (*Aguilar* at 732) but at home on the mainland in the comfort and familiar surroundings of her permanent residence in Poulsbo, Washington. She commuted to work on her vessel by private vehicle. She was not paid travel time or mileage by her employer.

Aguilar, in contrast, lived and worked on his vessel for the duration of his voyage. He had no commute, as his vessel was his home as well as his place of employment. It was the very "framework of his existence." *Aguilar* at 732. He only left the vessel when directed or authorized to do so for the ship's business or for personal leave for a specific period.

During her regular WSF employment, Ms. Shoffner worked a fixed, specific 8-hour shift, 8:45 a.m. to 1:45 p.m., five days per week, Sunday through Thursday. When her scheduled shift ended, she was off duty and free to go and do as she pleased. She was no longer in the "service of the ship" and "answerable to the call of duty." Aguilar, on the other hand, when off duty, was still on board the vessel, responsive to its chain of command and discipline, and "answerable to the call of duty" should he be summoned.

Aguilar held that blue-water, ocean-going seamen on authorized shore leave were entitled to maritime remedies of maintenance, cure, and unearned wages for injuries sustained when traveling the only available route between their moored ships and the public streets. The law for commuter seamen, such as Shoffner, is just the opposite. Maintenance, cure, and unearned wages are not available. *Sellers v. Dixilyn Corp.*, 433 F.2d 446 (5th Cir. 1970); *Daughdrill v. Diamond M. Drilling Company*, 447 F.2d 781 (5th Cir. 1971); *Lee v. Mississippi River Grain*

Elevator, Inc., 591 So.2d 1371 (La. App. 1991).[1] When a commuter seaman's shift has ended, and once the seaman leaves the vessel, and leaves her employer's premise to begin her commute home, the seaman is no longer in the "course of their employment" or "the service of the ship." The seaman is no longer at work on the vessel and no longer responsive to its chain of command and discipline and "answerable to the call of duty." The law is no different before the commuter seaman reports to her vessel. In off-duty status, the commuter seaman is not entitled to maritime remedies for injuries sustained off the employer's premises, either while commuting or while at home.

II. SUMMARY OF ARGUMENT

The primary case Ms. Shoffner relies upon, *Aguilar*, is readily distinguishable. *Aguilar* involved the consolidated appeals of two ocean-going seamen on authorized shore leave. One seaman left his ship in Philadelphia. As he was walking on the pier where this ship was moored, he fell into a ditch and was injured. The other seaman discussed in *Aguilar* was injured returning to his ship. He was walking on a roadway

[1] The substantive law applicable in admiralty cases is, in general, the federal maritime law which in many respects is distinct from state law and the common law. The federal maritime law comes both from statutes passed by the Congress, and from judge-made law. The federal judiciary both constitutionally and traditionally plays a much greater role in the development of maritime law and than in the development of non-maritime common law. State law plays a diminished and secondary role." *Schoenbaum* at 82 ¶ 3-2; at 152-78.

one-half mile from the ship when he was struck by a negligent motorist. Both seamen sought recovery for their injuries in the form of maintenance (daily living expenses for room and board while disabled from work) and cure (the cost of reasonable and necessary medical treatment) as well as unearned wages (wages to be paid for the duration of the voyage on which they had contracted to serve). Both employers objected to the seamen's claims on the grounds that they were not on the ship's business when injured but instead were on authorized personal leave for their personal benefit. *Aguilar* at 725-26. The law at that time provided maritime remedies for an ocean-going seaman if the seaman's duties required him to go ashore on the ship's business. If the seaman left the ship contrary to orders, no maritime remedies were available. The availability of maritime remedies for seamen on authorized shore leave had been recognized by some courts and rejected by other courts. *Aguilar* at 732-33. In *Aguilar*, the Supreme Court reasoned that these ocean-going seamen were entitled to maritime remedies as their jobs subjected them to "extraordinary hazards and limitations" when compared to land-based occupations. Seamen must live and work under the "unique hazards" presented by high seas and storms. When ill or injured, skilled medical care might not be immediately available. When off duty, the seaman is still confined to his quarters and separated from his friends, family, and the leisure time

activities available to him at his permanent residence on land. If leave is granted, he exercises it at an unfamiliar foreign port. "Furthermore, the seaman's unusual subjection to authority adds the weight of what would be involuntary servitude for others to these extraordinary hazards and limitations of ship life." *Aguilar* at 727-28.

The policy reasons recognized in *Aguilar* for making maritime remedies available to ocean-going seamen on shore leave are inapplicable to off-duty brown-water, commuter seamen living at their permanent residence on the mainland and commuting to and from their vessels in their personal vehicles. *Sellers*, 433 F.2d 446; *Daughdrill*, 447 F.2d 781; *Lee*, 591 So.2d 1371.

In *Sellers* the Fifth Circuit distinguished *Aguilar* and held that maritime remedies of maintenance and cure were not available to a mobile oil platform worker when he was injured in a car driven by a co-worker on the first day of their 7-day off-duty period. The evidence indicated that Sellers worked and lived seven days on the platform followed by seven days off duty, off the platform, living ashore at his permanent residence. Since he was commuting home in an off-duty status, he was not on authorized shore leave status and not in the service of the ship or answerable to its call of duty.

Daughdrill also distinguished *Aguilar* and held that the maritime remedy of a Jones Act negligence action for wrongful death was unavailable for an offshore drilling barge worker when the worker was killed returning to work after five days off duty when en-route to his employer's landing. The evidence indicated that the decedent worked and lived ten days on the barge followed by five days off work, off the barge, living ashore at his permanent home. The Court held he was not in the course of his employment for Jones Act coverage when the accident occurred.

Lee also distinguished *Aguilar* and cited *Sellers* and *Daughdrill* as precedent. Lee, a relief mate on a river push boat, was not found to be "in the course of his employment" for Jones Act coverage at the time he was fatally injured. Lee was in an automobile accident driving home from his employer's dock on the first day of his 30-day off-duty period. The evidence was that he worked a 30-day shift on duty, living and working on the vessel, followed by a 30-day period off duty, living ashore at home. During the time Lee was off duty, he was replaced by another employee.

These three brown-water cases, involving commuter-seamen, are central to WSF's argument that Ms. Shoffner cannot receive traditional maritime remedies for an accident incurred while she was commuting to her vessel.

III. ISSUE PRESENTED FOR REVIEW

Did the trial court correctly dismiss Shoffner's cause of action for maintenance and cure by ruling that Ms. Shoffner as a brown-water, commuter-seaman who lived ashore, was not paid for her commute, worked a specific eight-hour shift, and was replaced by another crew member when off duty, was not in the service of her ship or in the course of her employment when she allegedly injured herself on a Kitsap County sidewalk adjacent to a Kitsap County street while walking toward Lofall Terminal where her vessel was moored to begin her shift?

IV. COUNTERSTATEMENT OF THE CASE

The Hood Canal Bridge was scheduled to be closed to motorists for a six-week period beginning May 1, 2009, and ending June 13, 2009. The bridge was closed in order to allow the Washington State Department of Transportation (WSDOT) to replace portions of the bridge's components pursuant to the Hood Canal Bridge reconstruction project initiated in 1997. To mitigate travel and transportation difficulties for the general public, WSDOT provided various transportation options for travelers. The primary option was fare-free, passenger-only ferry service across Hood Canal. The route ran from Lofall in Kitsap County on the eastern side to South Point in Jefferson County on the western side. Motorists were able to park their vehicles, free of charge, in two 1,500

vehicle parking lots, located near the Lofall and South Point terminals. The lots were equipped with an attendant, restrooms, a shelter, and lighting. Free transit service departed every 15 minutes to and from the parking lots and the terminals. Free transit was also available to and from the park-and-ride lots and nearby metropolitan areas. To avoid traffic congestion at South Point and Lofall, motorists were not allowed to pick up or drop-off passengers in the vicinity of the docks. This limited access was enforced by Washington State Patrol Troopers on duty at each terminal. CP at 130 ¶ 3.

As part of its Hood Canal Bridge Closure mitigation plan, WSDOT executed a detour agreement with Kitsap County to allow it to route shuttle buses carrying passengers wishing to use the free water shuttle service across Hood Canal over Kitsap County roads to access the Lofall dock on the eastern side of the canal. CP at 381-84. The buses ran between the Port Gamble park-and-ride lot and the Lofall water-shuttle dock. CP at 383. The State agreed that "[it] shall be responsible only for that extra maintenance and repairs of the local agency's [Kitsap County's] roads or streets occasioned by this projected use." CP at 381 ¶ V. The traffic control plan approved by WSDOT and Kitsap County restricted traffic to the Lofall dock to "Transit and Local Traffic Only." CP at 383.

As an additional traffic mitigation measure for the residents of Lofall and for the convenience of its employees, WSF entered into a lease with a Lofall landowner who owned a parking lot on NW Wesley Way, the Kitsap County road leading to the Lofall dock. CP at 391-92. This is the parking lot where Ms. Shoffner parked her vehicle and began walking down the county sidewalk before the alleged accident occurred. CP at 68, 87.

WSF entered into a charter agreement with VRT to make the water shuttle service available. VRT supplied two vessels. Each vessel came with an experienced master/operator who was an employee of VRT. WSF supplied an advisory master and two deck hands who were WSF employees. CP at 114 ¶ 13. In order to provide service in the morning, afternoon, and evening, seven days a week, WSF was required to create seven watches, each made up of three-person crews, working 8 hour shifts, five days per week. Each watch worked a fixed schedule. CP at 119 ¶ 3, 123-28. WSF employees applied for these positions by bidding on them based on their union seniority; the employees with the greatest seniority were awarded these temporary assignments. CP at 114 ¶ 13.

Ms. Shoffner was not ordered or directed by WSF to work as an Able Bodied Seaman (AB) on this temporary shuttle service. She elected this assignment based on her seniority for a "change of hours and change

of scenery and change of crew." CP at 72. The position she chose was that of the AB on "A Watch." Her co-workers were Master Tom Webster and Ordinary Seaman Hallette Salazar. The vessel master/operator was a VRT employee. Her shift ran from 5:45 a.m. to 1:45 p.m., sunrise to midday, five days per week, Sunday through Thursday. Friday and Saturday were her days off. CP at 119-20 ¶ 3; CP at 72, 96-100.

The employees assigned to the water shuttle service worked a fixed schedule and commuted to and from their place of employment and their homes by making their own transportation arrangements. They were not paid mileage or travel time while commuting and were not paid wages while commuting. They were only on duty while working their shift on the vessel to which they were assigned. When these employees were off duty they were not considered to be on leave subject to immediate recall. On their scheduled time off they were free to do as they pleased and were not expected to be on emergency standby status. CP at 114.

As a practical matter Ms. Shoffner was not subject to a recall to duty on her scheduled time off because of the terms of her contract with WSF. CP at 113-14 ¶¶ 12-13. Generally speaking WSF employees, including Ms. Shoffner, work fixed schedules and are not routinely subject to being called to duty on their scheduled time off. Union rules discourage the practice. CP at 113-14 ¶ 12.

A detailed analysis of the terms of the 2007-2009 IBU Collective Bargaining Agreement (Union Rules) make it clear why Ms. Shoffner was not subject to being called to duty during her time off. CP at 273-358. As an AB, Ms. Shoffner was earning $23.82 an hour. Union Rule 17.02; CP at 294. Union Rule 10 addresses overtime. CP at 285. Union Rule 10.01 provides overtime is two times the straight time rate. CP at 285. In Ms. Shoffner's case, this would be $47.64 an hour. Extended work or early call-out work is paid at the overtime rate. Union Rule 10.02, 10.03; CP at 285. Union Rule 10.04 provides "Employees may request not to work overtime. This request will be granted unless no other qualified replacement is available or a bona fide emergency exists which requires an employee to work overtime." CP at 285. Union Rules 10.05 and 10.07 provide that employees called back to work after completing their shift or on their scheduled day off will receive a minimum of eight hours overtime. CP at 285-86.

Union Rule 10.06 provides that an employee may refuse a call back on his scheduled day off or on his vacation and will not be disciplined for refusing assignments. CP at 285. Union Rule 10.06 further provides that the employer can require a call back to work on an off-duty day or a vacation day only if direct contact is made, no other qualified employee is available, and vessel manning requirements can't be

met in a timely manner. In those circumstances a guaranteed maximum eight hours of overtime is paid, together with travel time and mileage, and the employee is awarded an additional day off. CP at 285-86.

Because of WSF's agreement with Shoffner's union, her Port Captain declared in his declaration that WSF employees are not routinely subject to a recall to duty. CP at 113-14 ¶ 12. Ms. Shoffner identifies no prior instances in her deposition or declarations where she was called to duty on her scheduled time off, or required to work overtime at the end of her shift, either on this temporary assignment at Hood Canal or on her permanent assignments.

The day on which the alleged accident occurred, May 6, 2009, at 5:40 a.m. (CP at 116) was Ms. Shoffner's sixth day on this special assignment. She had completed three days of vessel familiarization and training on April 28, 29, and 30. CP at 123-25. Her time sheet (CP at 544), employment records (CP at 537), and schedule (CP at 127) confirm that she worked Sunday, May 3, and Monday, May 4, 0545 hours to 1345 hours. She missed work Tuesday, May 5, for "family leave" reasons.

At her deposition, Ms. Shoffner testified that at the time of her accident, she was a resident of Poulsbo, Kitsap County, Washington. CP at 66. She stated that she was not paid travel time or mileage for driving to and from her shift at Lofall. CP at 75. She testified that the

time of the accident was approximately 5:40 a.m. because her scheduled shift began at 5:45 a.m. CP at 69. She stated that the accident occurred on Wesley Way, a Kitsap County Road. CP at 69. She marked the location of her accident with an X mark on a photograph she took of the area. CP at 67, 81. The location of the accident is the county sidewalk adjacent to the Kitsap County road. Maps of Lofall, the County road Wesley Way and the employee parking are found at CP at 134-43.

Ms. Shoffner testified that on the day of the accident she parked her car at Lofall in the employees' parking lot on Wesley Way, uphill from the ferry dock. CP at 73. She testified that she walked downhill on the sidewalk to board the ferry as she had done her two prior work days at that same time in the morning. CP at 73. She stated that all employees walked downhill from the parking lot on the sidewalk to access the vessel to report for work. CP at 77. She describes the accident as occurring as she "ended up stepping down in a dip in the road that either had just the dip or some debris, some branches in it, that I was not prepared for and not able to see." CP at 69. She admits she did not fall. CP at 69. She admits that she did not stoop down to see what she stepped on or in. CP at 69. She states she could not see what was on the ground because it was too dark. CP at 69. She admits that sunrise was approximately 5:45 a.m.

(CP at 75), and that her scheduled shift began at 5:45 a.m. CP at 69. She states there were no witnesses to her accident. CP at 75.

Ms. Shoffner testified that she proceeded to work her shift that day. She admitted she did not take any time off that day or on any other day during this one-month special assignment for any injury she believed she may have sustained from this event. CP at 76.

Ms. Shoffner's representations in her appellate brief and in her declaration (CP at 66) that the alleged accident occurred "just before 5:30 a.m." (CP at 270) contradict her prior sworn deposition testimony that the time of the accident was 5:40 a.m. and, consequently, should be disregarded. Appellant's Br. at 5; CP at 69.[2] She made this representation on the basis of a WSF business record which lists the start time for her shift on May 6 as 5:30 a.m. CP at 364. The 5:30 a.m. start time is contradicted by Ms. Shoffner's accident report dated July 10, 2009 (CP at 95), by the schedule for her watch (CP at 539), by business records for the other members of her watch (CP at 541-42), by the handwritten time sheets submitted by Plaintiff and the members of her watch (CP at 544-46) and by the declaration of Hallette Salazar, submitted by Plaintiff (CP at 367). All show a 5:45 a.m. start time. Since sunrise was at 5:45 a.m. on May 6, 2009, morning daylight was in a civil twilight condition. CP at

[2] *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482 (2007); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999)

156-57. Meteorologists define civil twilight as illumination sufficient that most ordinary outdoor activities can be done without artificial lighting. CP at 156-57. The lighting at civil twilight was more than sufficient for Ms. Shoffner to see what she stepped on or in at the time of the incident. CP at 156-57.

Ms. Shoffner has no credible explanation for why she did not report her injury at the time it occurred. She was well aware that she was required to file a written "Employee Report of Accident" at the time of the accident, as she had filed 20 claims prior to this incident. CP at 113, 118 ¶ 10. She testified at her deposition that she informed her WSF Supervisor Master Tom Webster. CP at 70. Webster states in his declaration that he has no recollection of this report being made. CP at 120-21 ¶¶ 5-6. The accident report submitted was completed July 10, 2009 (CP at 95), five weeks after the Hood Canal shuttle service ended on June 4 (CP at 101) and a month after Ms. Shoffner returned to her regular assignment on the M/V WENATCHEE on June 8, 2009 (CP at 101-02).

V. ARGUMENT

A. Standard of Review

On appeal of a summary judgment, the standard of review is de novo. An appellate court performs the same inquiry as the trial court. When ruling on a summary judgment motion, this Court views all facts

and reasonable inferences in the light most favorable to Ms. Shoffner, the nonmoving party. This Court may grant or affirm the trial court's award of summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

B. Relevant Maritime Remedies

Thomas J. Schoenbaum discusses admiralty and maritime remedies in his practitioner treatise titled *Admiralty and Maritime Law*. Thomas J. Schoenbaum, *Admiralty and Maritime Law* (4th ed. 2004) (hereafter *Schoenbaum*). As Schoenbaum's treatise makes clear, maritime and admiralty remedies have been carefully defined by courts during the past century.

> A seaman who suffers injury or death in the service of the ship has three important remedies against his employer: (1) maintenance and cure [and unearned wages]; (2) a cause of action for unseaworthiness of the vessel; and (3) a cause of action for negligence under the Jones Act [46 U.S.C. § 688]. All three remedies are unique to seamen; no other worker in our society can invoke such powerful relief in the event of an industrial accident.

Schoenbaum at 287 ¶¶ 6-8.

> MAINTENANCE AND CURE; UNEARNED WAGES
>
> "Maintenance" is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of the

> ship. [*Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527, 58 S. Ct. 651, 653, 82 L. Ed. 993 (1938)]. "Cure" is the right to necessary medical services. [*Calmar,* Id.] Both extend to the point of "maximum recovery." The seaman also has a right to be paid unearned wages for the period from the onset of the injury or illness to the end of the voyage. [*Farrell v. United States*, 336 U.S. 511, 69 S. Ct. 707, 93 L. Ed. 850 (1949)].

Schoenbaum at 376-77 ¶¶ 6-28.

UNSEAWORTHINESS

> The duty of seaworthiness is absolute and independent of negligence, but the mere fact that there is an accident is not enough for a finding of unseaworthiness. The test for an unseaworthy condition is whether the vessel, equipment, or appurtenances were "reasonably fit for their intended use." [*Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550, 80 S. Ct. 926, 933, 4 L. Ed. 2d 941 (1960)]. The shipowner will prevail by submitting rebuttal evidence that an appliance or piece of machinery was reasonably fit for its intended use even in its imperfect condition. [*Jordan v. United States Lines, Inc.* 738 F.2d 48 (1st. Cir. 1984)] The duty is reasonableness, not perfection. The shipowner is not required to provide the latest and best equipment and there is no warranty for an accident free ship. [*Mitchell, Id.* at 550]

Schoenbaum at 362-63 ¶¶ 6-25.

JONES ACT NEGLIGENCE

Historically, a seaman had no cause of action for negligence under maritime law. *Schoenbaum* at 287-89 ¶¶ 6-8; *The Osceola*, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903). The Jones Act, 46 U.S.C. § 688, was passed by Congress in 1920 to grant seamen a cause of action against their

employers for negligence. The Jones Act, as now codified in 46 U.S.C. § 30104, provides as follows:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

C. Summary

It is undisputed that Ms. Shoffner was not earning wages as a seaman while off duty, was not subject to the call of duty while off duty, and was not being paid travel time for her commute to and from work. Since she had not reported to work on her employer's premises when this alleged injury occurred, she is not entitled to bring a maritime action for recovery of maintenance, cure, unearned wage, and general damages on the authority of *Sellers*, *Daughdrill*, and *Lee*, supra.

D. The Distinction Between Blue-Water v. Brown-Water Seaman Is Essential To Maritime Law

Schoenbaum notes that, for purposes of maritime remedies, a key distinction is to be drawn between blue-water and brown-water seamen. *Schoenbaum* at 343 ¶¶ 6-21.

> Whether a seaman is in the course of his employment at the time of his injury may vary as to "blue water" and "brown water" seamen. With respect to the traditional "blue water" seaman, the courts are quite liberal, considering shore leave

> and recreation as well as travel to and from the vessel as part of the seaman's service. As to "brown water" employees who return home every night, travel to and from work should not be considered part of his service on the vessel. Thus, there may be no Jones Act cause of action where the employee is injured while driving home from work in his own vehicle. [*Lee v. Mississippi River Grain Elevator, Inc.*, 591 So.2d 1371 (La. App. 1991)].

E. The Relevant Maritime Case Authority Requires That Shoffner's Cause of Action Be Dismissed

Lee v. Mississippi River Grain Elevator, Inc. , supra, the primary case relied upon by *Schoenbaum* in distinguishing between blue-water and brown-water seamen, was a wrongful death action brought by the wife of a deceased mate employed on a river push-boat. She alleged Jones Act negligence and unseaworthiness. Lee was fatally injured in an automobile accident while driving to his family home 110 miles from his vessel. He left his vessel at the time of his regular crew change. His schedule consisted of 30 days on duty followed by 30 days off duty. While on duty, he lived on the vessel. While off duty, he lived at home. Lee was not paid while off duty. His employer did not provide transportation to and from his home. When Lee left the vessel on the day in question, he had ended his 30-day assignment. He was replaced by another mate who began a 30-day shift on the vessel. The Louisiana Court of Appeals held Lee was not in the "service of the ship" for maintenance and cure purposes or "in the course of employment" for Jones Act coverage at the time of the accident.

As authority for dismissal, the Louisiana Court of Appeals cited two Fifth Circuit cases: *Sellers*, 433 F.2d 446; and *Daughdrill*, 447 F.2d 781.

In *Sellers*, the plaintiff had been working for eleven months as a roustabout on a mobile oil drilling platform fifty miles from shore in the Gulf of Mexico. He was on duty on the rig seven days and then off duty off the rig for the following seven days. When on duty, he worked a 12-hour shift and then was off duty for a 12-hour period. During his 7-day shift he ate and slept on the oil rig. When his 7-day shift ended, he left the rig and lived ashore. His employer transported him from the coast to the rig by boat, which was a trip that took five to seven hours. Transportation was provided at the beginning and end of the 7-day shift.

Sellers was paid by the hour for the time he worked on the rig, and was paid a stipulated sum for "boat time" for the transportation to and from the rig. He received no pay for the seven days he was off duty. His pay began and ended at the shoreline dock in Grand Isle, Louisiana. Duplicate, separate crews took over all work on the rig during Sellers time ashore. Two crews staffed the rig during the 7-day work week, each crew working a 12-hour shift. A crew member's off-duty time was his personal time to spend as he pleased. Sellers' drilling superintendent testified that to his knowledge no one had ever been called back to duty during his off-duty time.

Sellers was injured as he drove home after his 7-day tour of duty ended. He had been transported from the rig to the dock at Grand Isle, arriving at 6:30 or 7:00 p.m. His shift ended when he arrived at Grand Isle. At 2:30 a.m. the next morning, as a co-worker was transporting Sellers to his home, in Colfax, Louisiana, the co-worker struck a concrete abutment 250 miles north of Grand Isle. Sellers was injured in the accident.

The trial court dismissed Sellers' claim for maintenance and cure based on this factual record. Sellers appealed. The Court of Appeals for the Fifth Circuit affirmed dismissal, distinguishing *Aguilar* (318 U.S. 724):

> Sellers could not be said to be on authorized shore leave at the time of the accident. In fact, his 'leave' or time off bore little resemblance to the shore leave of the traditional blue-water seaman. The shore leave status found by the Supreme Court to exist in *Aguilar v. Standard Oil Company of New Jersey*, was held to arise from the demands placed upon this more customary type of maritime employee. This was a man who, as a necessary incident of irregular shipboard employment, was authorized to go ashore from time to time and place to place for diversion and relief from the routine of the ship. The court found that such a seaman as Aguilar was often more susceptible to contracting disease and incurring injury than the regular shore-based employees because the conditions of the voyage put him ashore in distant and unfamiliar ports. The opinion also pointed out that not only did the shipowner's business separate such a seaman from his usual places of association, but also, since he was not replaced while he

> was ashore, he remained at all times subject to his shipping articles and recallable at the will of his master.
>
> Not so for this off-shore worker in the oil industry. Sellers' employment was arranged into definite, equal periods on shore and on the rig. He was subjected to no foreign or irregular accommodations. Such a worker was to a large extent able to maintain the home life of ordinary shore dwellers. A separate crewman regularly replaced him and recall was not contemplated under any ordinary circumstances.

Sellers at 448 (citation omitted).

In *Sellers*, the Fifth Circuit held that although plaintiff was a seaman, he did not prove that he was either (1) on authorized shore leave or (2) was answerable to the call of duty at the time of the accident. The Fifth Circuit affirmed the trial court's dismissal of Sellers' action.

Daughdrill, supra, is the second case relied upon in *Lee*. *Daughdrill* was a wrongful death action under the Jones Act. In *Daughdrill*, the Fifth Circuit reversed the trial court's judgment for the plaintiff under the Jones Act.

Daughdrill had been a drilling crew member on a submergible drilling barge located three miles from shore. He worked 10 days straight on the drilling barge. He ate and slept on the barge. His employer, the owner and operator of the barge, transported him to the barge at the beginning of his 10-day shift and from the barge at the end of his 10-day shift. Daughdrill was paid travel time when he and his crew were on the

transport boat. Daughdrill's employer did not pay him or other crew members for land travel, did not provide land transportation, and did not reimburse them for the expenses of land travel. During the five days Daughdrill and his crew members were off work, they were free to do as they pleased. They were rarely, if ever, called back to work on their days off and, if called, were under no obligation to return to work. Daughdrill died in an automobile accident returning to work after five days at home when his vehicle ran off the road 100 miles from the landing where transportation to the rig departed. The Fifth Circuit held that the facts in *Daughdrill* were indistinguishable from the facts in *Sellers*.

The *Daughdrill* Court reasoned that *Sellers* was sound precedent, even though *Sellers* was a suit for maintenance and cure and *Daughdrill* was a wrongful death action under the Jones Act. The Fifth Circuit reached this conclusion because the Supreme Court had held in *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129, 80 S. Ct. 247, 4 L. Ed. 2d 191 (1959) that the term "course of employment" under the Jones Act is equivalent to "the service of the ship" formula used in maintenance and cure cases.

F. The Blue-Water, Ocean-Going Seamen Cases Relied Upon By Shoffner are Readily Distinguishable From The Circumstances of This Case

Ms. Shoffner relies almost exclusively upon cases concerned with blue-water, long-voyage, high-seas, ocean-going seamen who live on board the vessel during their period of contracted service. Since Ms. Shoffner is a brown-water, commuter seaman who lives on shore and commutes to and from her scheduled shift on the vessel at her own expense, these blue-water cases are not valid precedent and are not factually relevant to the issue presented by Ms. Shoffner's case. In her opening brief, Ms. Shoffner relies upon at least 17 blue-water cases. When each of these cases is examined in detail, it is clear that not one of them supports the award of maritime remedies to Shoffner.

The primary case Ms. Shoffner relies upon is *Aguilar v. Standard Oil Co.* Appellants Br. at 1, 7-9, 11, 15-17, 23-24. *Aguilar* held that blue-water seaman were entitled to maintenance, cure, and unearned wages when injured while leaving or returning from authorized personal shore leave on the only available route between their moored ship and the public street. The ingress-egress rule articulated in *Aguilar* is applicable to ocean-going seamen, but has no applicability to Ms. Shoffner, a commuter seaman. See, Section II, above, distinguishing *Aguilar*.

The other cases cited or discussed by Ms. Shoffner can also be distinguished. *Vaughn v. Atkinson,* 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962) held that a blue-water seaman was entitled to maintenance and cure for a disease contracted during a three-month voyage. Appellant's Br. at 7. Ms. Shoffner's claimed injury occurred prior to her shift. *Vaughn* is, therefore, not on point.

Black v. Red Star Towing, 860 F.2d 30 (2nd Cir. 1988), held that a vessel owner/employer is entitled to indemnity for maintenance and cure paid to its employee, an engineer on its tug, against a negligent tortfeasor, the dock owner, when the dock's ladder being used for ingress and egress to the tug failed and the engineer was seriously injured. Appellant's Br. at 7. Ms. Shoffner was injured on a public street 330 feet from the fenced dock area where her vessel was moored and, therefore, a case concerning indemnification of the employer for a method of ingress supports WSF's defense in this case. In *Black* it was the dock owner, not the tug, which was liable for the seaman's injury.

Calamar S.S. Corp. v. Taylor, 303 U.S. 525, 58 S. Ct. 651, 82 L. Ed. 993 (1938), involved an ocean-going seaman who contracted an incurable disease when he stubbed his toe in the engine room of the vessel during its voyage. The issue on appeal was the duration of maintenance

and cure. Appellant's Br. at 7. Duration of maintenance and cure due to disease contracted board ship is irrelevant to Ms. Shoffner's case.

Vella v. Ford Motor Co., 421 U.S. 1, 95 S. Ct. 1381, 43 L. Ed. 2d 682 (1975), involved a Great Lakes seaman who slipped and fell on board ship two months before the voyage ended. Maintenance and cure was held to continue until a medical diagnosis was made that the condition is permanent and therefore incurable. Appellant's Br. at 7. Ms. Shoffner is a commuter seaman injured on a public sidewalk. Duration of maintenance and cure for a fall on board her ship is not an issue in Ms. Shoffner's case.

Farrell v. United States, 336 U.S. 511, 69 S. Ct. 707, 93 L. Ed. 850 (1949), involved an ocean-going seaman injured when he fell in a dry dock returning from shore leave in Palermo, Sicily during World War II. The court held that the seaman was entitled to maintenance and cure until maximum cure is achieved or the condition was declared permanent. Appellant's Br. at 8, 16. As a commuter seaman, Ms. Shoffner lives at home and commutes to her vessel to work a specific shift. When off work, she is off duty, not on authorized shore leave. Maintenance and cure is unavailable to an off-duty, brown-water seaman.

Daughenbaugh v. Berkleham Steel Corp., Great Lakes S.S. Div., 891 F.2d 1199 (6th Cir. 1989), is a Jones Act negligence case involving a

blue-water seaman. Appellant's Br. at 8, 16. *Daughenbaugh* held that an intoxicated Great Lakes seaman who drowned returning to the ship from shore leave was injured in the course of employment. Ms. Shoffner, as a brown-water commuter seaman, was off duty, not on shore leave, when she was allegedly injured.

Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S. Ct. 1317, 93 L. Ed. 1692 (1949) is a Jones Act negligence case involving an ocean-going seaman on a voyage to China who sued his employer for negligent failure to prevent his disease contracted during the voyage. Appellant's Br. at 8, 25. The court held that a general agent of the war shipping administration was not liable for the negligence of the master. *Cosmopolitan Shipping Co.* is inapplicable to Ms. Shoffner who did not contract a disease while on duty aboard her ship.

States S.S. Co. v. Berglann, 41 F.2d 456 (9th Cir. 1930) involved an ocean-going seaman who brought a Jones Act action for personal injuries sustained when a door slammed shut on his arm in high seas. The court held he had not assumed the risk of this injury. Appellant's Br. at 9-10. Ms. Shoffner is a commuter seaman injured on a public street commuting to work. Assumption of the risk (while at sea) is not an issue in Shoffner's case.

Braen v. Pfeifer, supra, involved a blue-water seaman who brought a Jones Act negligence action for personal injures. The court held that the seaman was in the course of his employment when he was injured not on his barge but on a catwalk unrelated to the barge which collapsed while he was attempting to carry out orders from his supervisor. Appellant's Br. at 9, 11. Ms. Shoffner, a commuter seaman, was not under orders from her supervisor at the time of her alleged injury. She was not injured in the course of employment.

O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596 (1943), concerns a Great Lakes blue-water seaman who brought suit under the Jones Act. The court held he was injured in the course of his employment when the Master directed him ashore to assist in the repair of a gasket to a conduit being used to convey the ship's cargo of sand to the shore. Appellant's Br. at 10. At the time of her alleged injury, Ms. Shoffner was not under direct orders from her Master and was not injured in the course of employment.

Marceau v. Great Lakes Transit Corp., 146 F.2d 416 (2nd Cir. 1945) concerns a blue-water, Great Lakes seaman held to be in the course of his employment under the Jones Act. Appellant's Br. at 11. Marceau was injured when returning from shore leave when he slipped and fell on flour meal on the dock within 3 feet to 5 feet of the ship's ladder provided

by the ship as a means of ingress and egress to and from the ship. Ms. Shoffner was not a blue-water seaman on shore leave when injured. She was off duty commuting to work.

Wilson v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 841 F.2d 1347 (7th Cir. 1988), involved a suit by a railroad employee under the Federal Employers' Liability Act (FELA). Appellant's Br. at 12; Respondent's Br. at 18, supra.[3] Wilson was paralyzed during the work day when the employee/driver of the car in which he was riding fell asleep at the wheel. The employees were marking re-useable rail on a 23 mile long segment of track scheduled for replacement. The employer did not provide transportation to the work site but the employees were paid mileage to transport themselves to and from work.

The appellate court reversed summary judgment for the railroad, holding that an issue of fact existed as to whether the employees were driving in the course of their employment. The employees testified they were looking for their supervisor to obtain clarifying instructions at the time of the accident. Appellant's Br. at 12. *Wilson* is distinguishable because Ms. Shoffner has provided no evidence from which a finder of fact might reasonably infer she was injured in the course of her employment.

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[3] The Jones Act states that the federal laws governing recovery for personal injury to railroad employees (FELA) apply to Jones Act claims. See p. 18, above.

Todahl v. Sudden & Christenson, 5 F.2d 462 (9th Cir. 1925) is a blue-water, ocean-going seaman case that was decided before *Aguilar*. Appellant's Br. at 15. Ms. Shoffner errs in relying upon this case. Even though he was a blue-water seaman, Todahl was denied recovery for general damages for personal injuries when he fell on a dock where his ship was moored as he was returning from shore leave.

Todahl was a blue-water seaman who, prior to the Ninth Circuit's decision in *Aguilar* was denied recovery under circumstances similar to those surrounding the injury alleged by Shoffner. *Todahl* provides Ms. Shoffner with no basis for recovery. If it has any relevance to this case, it supports WSF's defense.

Hocut v. Ins. Co. of N. America, 254 So. 2d 108 (La. App. 3rd Cir. 1971) (Appellant's Br. at 16) involved a newly hired ocean-going, blue-water seaman on a fishing vessel. Hocut had been living on board for several days preparing the vessel for departure; he fell into the water and drowned attempting to board the vessel at its dock the night before the vessel's scheduled departure. Hocut's wife brought suit under the Jones Act. The jury's conclusion that the blue-water seaman's death occurred in the course of his employment was sustained on appeal. Shoffner, unlike Hocut, was a commuter seaman who did not live on the vessel and was only on duty when she was aboard the vessel during her shift.

Warren v. U.S., 340 U.S. 523, 71 S. Ct. 432, 952 L. Ed. 503 (1951) (Appellant's Br. at 24) involves a blue-water seaman on shore leave in Naples, Italy in 1944 during World War II who fell from a balcony at a dance hall. The seaman was held to be in the service of the ship for maintenance and cure purposes. The Supreme Court relied upon *Aguilar*. Appellant's Br. at 24. Ms. Shoffner unlike Warren and Aguilar is a brown-water commuter seaman living ashore at her permanent home; she is only on duty when she is on the vessel performing her scheduled shift.

Smith v. United States, 167 F.2d 550 (4th Cir. 1948) (Appellant's Br. at 24) involved an ocean-going, blue-water seaman who worked and lived on board his vessel prior to his vessel's departure on the voyage he had contracted for. Prior to departing on the voyage, the seaman was granted shore leave. He broke his ankle in the driveway of a friend's house where he spent the night. The Fourth Circuit found he was in the service of the ship when injured. The Court cited *Aguilar* as authority. Appellant's Br. at 24. Unlike seaman Smith, Ms. Shoffner was a brown-water commuter seaman who had not contracted for a period of service aboard an ocean going vessel where she would live and work during her term of service. Ms. Shoffner worked a specific shift on her vessel but all other times lived at home commuting to and from work by her personal vehicle. When off duty, she was free to do as she pleased.

Central Gulf S.S. Corp. v. Sambula, 405 F.2d 291 (5th Cir. 1968), (Appellant's Br. at 24) involved an ocean-going, blue-water seaman on shore leave in Korea. The Fifth Circuit upheld the trial court's finding that the ship owner was responsible for the negligence of the doctor selected by the ship's agent to treat the injury to plaintiff's eye. Plaintiff's eye was injured in a criminal attack while on shore leave. The negligence of the doctor selected by the ship owner played a part in the seaman's loss of vision. Jones Act damages on appeal were affirmed. Unlike Sambula, Ms. Shoffner is a commuter seaman who is not on shore leave when off duty. When off duty she was free to go and do as she pleased.

G. The Brown-Water, Commuter Seamen Cases Cited By Shoffner are Either Distinguishable or Support WSF's Position

Pensiero v. Bouchard Transportation Co., 2008 AMC 363 (E.D. N.Y. 2007) (CP at 224-27) involved a brown-water seaman. Appellant's Br. at 12, 20. Pensiero was an Assistant Engineer on a tug. He worked three weeks on the tug followed by three weeks off the tug. He was paid by his employer for his transportation to and from work in the form of a daily stipend. CP at 224. Pensiero was injured when returning to work to begin his three-week shift. He fell and broke his foot crossing the tug of another employer to gain access to his employer's tug which would transport him to his specific vessel moored elsewhere. Pensiero's motion

for summary judgment for maintenance and cure was granted. The federal district trial court held that: "The fact that plaintiff was receiving a special stipend for transportation, over and above his per diem pay, confirms that getting on board was part of the employment relationship." CP at 226. Ms. Shoffner, by contrast, is not paid travel time or mileage commuting to or from work. Her commute is not part of her employment relationship with WSF.

Bavaro v. Grand Victoria Casino, 2001 U.S. Dist. LEXIS 3091 (N.D. of Ill., E.D) (CP at 228-33) involved a brown-water seaman casino worker suing for Jones Act negligence, unseaworthiness, and maintenance and cure. Appellant's Br. at 12. The language quoted by Ms. Shoffner in her brief from the 1998 opinion was not affirmed in the 2001 opinion. Based on the 2001 opinion, it appears that plaintiff was a River Boat casino worker living at home, commuting to and from work on a daily basis. It is unclear whether or not she was paid mileage by her employer. But, the opinion makes it clear that the injury occurred on her employer's premises and, therefore, that the case has no relevance to Ms. Shoffner's claim:

> "As she arrived at work... Bavaro slipped and fell on some stairs in the Grand Victoria parking garage. A three storey stair case . . . leads up to a skywalk that connects the garage to Grand Victoria's land-based pavilion where people board its gambling boats."

CP at 229. *Bavaro* is distinguishable from Ms. Shoffner's case as Shoffner's accident occurred on a Kitsap County sidewalk, not on premises owned and maintained by WSF. *Knight v. Grand Victoria Casino*, 2000 U.S. Dist. LEXIS 14471 (N.D. of Ill., E.D) (CP at 234-38) involved a brown-water seaman casino worker. Appellant's Br. at 13. The injury occurred on the premises of her employer. She sued for maritime remedies. Her employer moved for summary dismissal arguing the injury did not occur during the course of her employment under the Jones Act. The court denied Grand Victoria's motion for summary judgment ruling that:

> "Knight had established that Grand Victoria was responsible for maintaining the parking garage and pedestrian walkway in which Knight fell and that in the week leading up to Knight's accident it had performed snow and ice removal and salting activities, presumably to prevent accidents such as Knight's from happening."

Ms. Shoffner's case is distinguishable in that her accident occurred off of the premises of her employer on a sidewalk owned and maintained by Kitsap County.

Rannals v. Diamond Jo Casino, 265 F.3d 442 (6th Cir. 2001) (CP at 259-67) also involves a brown-water seaman casino worker. Appellant's Br. at 13. Rannals and three other riverboat casino employees in Dubuque, Iowa were provided by their employer with a rental car,

transportation expenses, lodging, food, tuition, and their daily wages to attend a one-week fire fighting school operated by the U.S. Department of Transportation in Toledo, Ohio. After attending several days of classes, Rannals slipped and fell on ice in the training center's driveway as she was leaving the facility. She sued her employer under the Jones Act. The trial court dismissed. On appeal, the Court of Appeals reversed, ruling genuine issues of material fact existed as to (a) whether plaintiff was acting in the scope of her employment under the Jones Act; (b) whether the fire school was a contractual agent of her employer; (c) whether her employer's agent had failed to correct a dangerous condition; (d) and whether the agent's negligence could be imputed to her employer. Shoffner errs in relying on this case because her accident occurred on a public street, a Kitsap County sidewalk, not on the premises of her employer's contractual agent.

Rodriguez v. Trump Casino, 2009 U.S. Dist. LEXIS 65501 (N.D. Ind.) (CP at 239-45) also involves a brown-water seaman casino worker. Appellant's Br. at 13. Rodriguez's accident occurred on the premises of her employer's agent, a cafeteria, where her employer offered free meals and beverages to its employees during their breaks as well as free shuttle service from the cafeteria to a free parking lot. Although Rodriguez had "punched out of her shift" as a dealer on a gaming boat owned by Trump

Casino, she was still on the premises of Trump's agent, the cafeteria operator when she slipped and fell. Trump moved for summary judgment. The District Court, denied the motion as genuine issues of material fact existed as to whether plaintiff was acting within the scope of her employment or in the service of the vessel when she fell. The motion for summary judgment on unseaworthiness was granted as the injury did not occur on the vessel. This case does not support Shoffner's position because Shoffner's accident occurred not on her employer's premises (or on the premises of a WSF agent) but on a public street, a Kitsap County sidewalk maintained by Kitsap County.

Ms. Shoffner cites *Williamson v. Western Pacific Dredging Corp.*, 441 F.2d 65 (9th Cir. 1971) (*Williamson* II) and *Cardillo v. Liberty Mutual Ins. Co.,* 330 U.S. 469, 67 S. Ct. 801, 91 L. Ed. 1028 (1947) as authority inconsistent with the cases WSF relies on, *Lee, Sellers,* and *Daughdrill.* Appellant's Br. at 19-22. In actual fact *Williamson* II and *Cardillo* are consistent with WSF's position.

Williamson involves a dredge worker, a brown-water, commuter seaman. Williamson was killed in a motor vehicle accident while commuting to work in a car pool arrangement with two co-workers. The District Court's opinion in *Williamson v. Western Pacific Dredging Corp.*, 304 F. Supp. 509, 512 (1969) (*Williamson* I) states that:

> "Each of the employees, by virtue of a union contract under which each was employed, was entitled to and was paid 'travel pay' by Western Pacific. The amount of the "travel pay" depended on the distance between the project and the city hall in certain designated cities."

The trial court held the death occurred in the service of the ship for maintenance and cure purposes and in the course of employment for Jones Act coverage. The Ninth Circuit affirmed in *Williamson* I. Since Ms. Shoffner was not paid travel pay or mileage by her employer, her accident on a public Kitsap County sidewalk before she arrived at work was not in the service of the ship or the course of employment.

Cardillo, cited above, also supports WSF's position on appeal. *Cardillo* involved interpretation of the phrase "in the course of employment" under the District of Columbia Workmen's Compensation Statute. Pursuant to union contract, the employer paid the employees a stipend for the cost of commuting in their own cars to the work site. While commuting to work in a carpool of co-workers, plaintiff was killed by a large stone thrown from under the wheel of a passing truck. A deputy commissioner ruled the injury was in the course of employment. The District Court affirmed commissioner's ruling. The Court of Appeals reversed. The U.S. Supreme Court affirmed the commissioner's ruling, noting that the phrase "'in the course of employment' which appears in most workmen's compensation laws" has generally been construed to

preclude compensation for injuries received by employees while traveling between their homes and their regular places of work. 330 U.S. at 479. Such injuries arise out of the hazards of the journey faced by all travelers and are unrelated to the employer's business. 330 U.S. at 479. But the Supreme Court recognized that exceptions to this general rule exist in certain circumstances, including an instance where the employer contracts to and does furnish transportation to and from work. This exception was recognized by the District of Columbia Workmen's Compensation Statute.

In Cardillo's case, the union contract satisfied this exception by requiring the employer to pay a stipend to its employees for transportation costs. Since Shoffner was not paid a stipend, travel time, or mileage, her injury is governed by the general rule identified by the Supreme Court rather than the exception applicable in *Cardillo*. Her injury occurred during the hazards of her journey; WSF was not responsible.

In *Weiss v. Cerasai Ry. Co. of New Jersey*, 235 F.2d 309 (2nd Cir. 1956) (Appellant's Br. at 21) a ferryboat worker was held to be a seaman, although he lived at home and worked as much off the ferry as on board the ferry. It was held that he was entitled to maintenance and cure for an illness which became evident while he was working *on board* the ferry vessel. Ms. Shoffner's complaint is distinguishable because it is based on an accident that occurred off of the vessel on a Kitsap County sidewalk.

Hudspeth v. Atlantic & Gulf Stevedoren Inc., 266 F. Supp. 937 (E. D. La. 1967) (Appellant's Br. at 21) concerns a tug worker who was denied maintenance by his employer because he lived at home and provided his own meals on the vessel. Hudspeth's injury occurred when he was *on duty on the tug* and attempted to sit down at the Master's invitation on a pallet which then collapsed. The trial court granted Hudspeth's motion for an order awarding maintenance, ruling that he was a seaman entitled to benefits under maritime law even though the vessel did not customarily furnish him with room and board.

It is undisputed that Ms. Shoffner is a seaman. Had her injury occurred aboard the vessel when she was on duty, WSF would not dispute her claim for benefits under maritime law. *Hudspeth* has no relevance to this case.

Vincent v. Harvey Well Service, 441 F.2d 146 (5th Cir. 1971) involves a brown-water seaman and is consistent with WSF's position. Appellant's Br. at 22. Plaintiff was an amphibious oil rig worker seaman who worked for 12 hours on the rig and then was off duty at home, on shore, for 24 hours of rest. Plaintiff was injured in an automobile accident. He was riding as a passenger in a car furnished by his employer and driven by a co-worker paid by the employer to drive rig workers to and from an assembly point 50 miles from shore, to the pier where

workers were transported to and from the oil rig by an employer-owned vessel. The accident occurred 40 miles from the pier on a journey to the assembly point after completion of a 12-hour shift.

Since the accident occurred while commuting in transportation provided for and paid for by the employer, the Fifth Circuit Court of Appeals held that the accident occurred in the course of plaintiff's employment. The Fifth Circuit found plaintiff was covered by the Jones Act and reversed the trial court's award of summary judgment to the employer. Unlike Vincent, Ms. Shoffner was not driving in a car furnished by her employer, or paid travel time. She was off duty, traveling on her own time and at her personal expense, not having reached her employer's premises to begin her shift.

H. The FELA Cases Cited By Shoffner are Either Distinguishable or Support WSF's Position

The Jones Act states that federal laws governing recovery for personal injury to railroad employees (FELA) apply to Jones Act Actions. Respondent's Br. at 18, supra. *Empey v. Grand Truck W.R.R. Co.*, 869 F.2d 293 (6th Cir. 1989) (Appellant's Br. at 14) involves a railroad worker injured on the hotel premises where his employer paid for employee lodging. Plaintiff was prohibited by federal statute from working more than 12 hours without resting. Federal statute also required

railroad employers to provide lodging for their crews. While at the lodging plaintiff was considered to be in the course of employment for FELA purposes. He was injured when he slipped and fell due to a leak in his bathroom. The negligence of the hotel was imputed to the employer. The jury verdict was sustained on appeal. Unlike *Empey*, when Shoffner was injured, she was on a Kitsap County sidewalk commuting to work on her own time and expense.

Erie Railroad Co. v. Winfield, 244 U.S. 170, 37 S. Ct. 556, 61 L. Ed. 1057 (1917) and *Schneider v. National Railroad Passenger Corp.*, 854 F.2d 14 (2nd Cir. 1988) support WSF's position in this case as they recognize the general rule under FELA that employees while commuting to and from work are not in the course of employment. Appellant's Br. at 12-13.

Both *Erie* and *Schneider* involved employees injured while leaving work, but still on their employers' premises. In *Erie* the employee parked his railroad engine in his employer's yard for the night and was walking through the railroad yard. As he was leaving work, he was struck and killed by another engine. It was held he was in the course of his employment at the time of injury and therefore covered by FELA. "In leaving the carrier's yard at the close of his day's work the deceased was discharging a duty of his employment." *Erie* at 173.

Schneider concerns an Amtrak ticket agent who was assaulted at 11:30 p.m., approximately 15 feet to 18 feet from her work station, as she entered her car to leave work. The agent sued her employer for compensation under FELA. Amtrak moved for dismissal. The trial court recognized the general rule that denies coverage under FELA for injuries occurring during the commute to and from work. The trial court also recognized the exception to that rule, which finds FELA coverage when the injury occurs while the employee is still on his employer's premises and in the process of leaving work. Cases for both propositions were cited. The trial court applied the general rule and granted summary judgment to Amtrak, reasoning that plaintiff was not in the course of her employment as she had left her employer's premises. The Court of Appeals reversed holding that issues of fact prevented summary judgment. The court observed that the premises outside the building where the attack occurred may have been owned by Amtrak. The case was remanded for a determination as to whether Amtrak owned the premises where the attack occurred. If owned by Amtrak, FELA covered the incident. If not, no coverage existed.

Under *Erie* and *Schneider,* Ms. Shoffner was not in the course of her employment or in the service of her ship when her alleged accident

occurred off WSF premises. Plaintiff raised no issue of material fact on this issue.

I. Additional Case Authority Supports WSF's Position

In *Price v. Connolly-Pacific Co.*, 162 Cal. App. 4th 1210 (2008), the California Court of Appeals held that a brown-water commuter seaman living out of a camper parked near his employer's premises during his weekday work shift was not in the service of the ship for maintenance and cure coverage when he contracted West Nile encephalitis. The case was tried on a stipulated statement of facts. Price was an operating engineer on a special purpose derrick barge operating in the Los Angeles harbor area. His work shift on the barge was 7 a.m. to 3:30 p.m., Monday through Friday. Because he lived in La Mesa, California, 240 miles from the job site, he requested permission from his employer to park his camper on his employer's parking lot near the job site where he could live during the work week. Permission was granted as an accommodation to Price. *Price* at 1216. He only commuted home to his permanent residence on weekends. On weekdays, he commuted to and from his camper on the premises of his employer and the barge where he was employed by means of a crew boat supplied by his employer. His employment-union contract did not require the employer to provide him with a commuting or housing allowance or to allow him to live out of his camper in his employer's

parking lot during the work week. When Price was off duty on weekends, and from 3:30 p.m. to 7 a.m. on weekdays, he was free to do as he pleased. *Price* at 1216.

Price's encephalitis first manifested itself when he started to feel ill at his permanent home in La Mesa on Saturday, August 24, 2004, the first day of his weekend. It was stipulated that the mosquito that infected him bit him sometime between Saturday, August 7 and Wednesday, August 18 on the basis of the incubation period for the West Nile Virus (which is three to fourteen days). *Price*, at 1216. Between August 7 and 18 Price resided in La Mesa on the weekends of August 7 and 8 and the weekend of August 14 and 15. The other seven days between August 7 and August 18 he resided in the camper at Los Angeles harbor.

Price argued, as Shoffner argues in this case, that he was in the "service of the ship" and "generally answerable to its call of duty" when he contracted the virus during his period of employment with defendant. Price's employment contract was for a specific period of employment as a winch operator on the derrick barge for a pier reconstruction project at Berth 100 beginning August 5, 2004. Since the disease was contracted and manifested itself during this period of contracted service, Price argued that he was entitled to maintenance and cure, citing the Shipowner's Liability Convention and *Warren* (340 U.S. 523) as authority.

The Court of Appeals rejected this argument as Price's disease first manifested itself when Price was at his permanent residence in La Mesa, California. The Court held that as a commuter seaman who was on shore leave because his scheduled shift had ended, Price was typically not answerable to the call of duty and, therefore, not in the service of the ship. The Court relied upon *Aguilar* (318 U.S. 724) when it reasoned:

> The elements necessary to establish a commuter seaman's right to maintenance and cure are no different from those for a blue water seaman; but, as Price recognizes, "in the service of the vessel" is a far narrower concept in the commuter context. As the trial court accurately summarized, "[A] blue water seaman on shore leave is typically answerable to the call of duty and consequently in the service of the ship, while a commuter seaman whose shift has just ended is typically *not* answerable to the call of duty and therefore not in the service of the ship." (*See*, e.g., *Shaw v. Ohio River Co.*, *supra*, 526 F.2d [193] at pp. 194, 198 [shipowner not liable for illnesses that manifested themselves while commuter seaman on shore and not answerable to call of duty]; *Forest v. Co-Mar Offshore Corp.* (E.D. La. 1981) 508 F. Supp. 980, 982 [commuter seaman injured on shore entitled to maintenance and cure only upon "showing that the seaman was acting pursuant to some employer directive or that the employer was a recipient of some benefit as a consequence of the seaman's shoreside activity"].) While spending the night in his camper-truck in his employer's parking lot, Price was under no obligation to perform any services for the shipowner and was not in any way answerability to the "call of duty." (See *Baker v. Ocean Sys., Inc.* (5th Cir. 1972) 454 F.2d 379, 384 ["it is clear as a matter of law that the seaman's answerability to the 'call of duty' imports at the very least some binding obligations on the part of the seaman to serve"].) That Price's illness may have been contracted between his date of hire and the date his

> employment on the *Long Beach* ended does not justify an award of maintenance and cure.

Price at 1221-22

The 2008 opinion in Price recognizes that, for the commuter seaman, the principle "in the service of the ship" is narrowly construed for maintenances and cure purposes. By contrast with a blue-water seaman, a commuter seaman, like Shoffner, is typically not answerable to the call of duty when their shift has ended.

VI. CONCLUSION

The trial court's dismissal of Ms. Shoffner's claims should be affirmed. She is a brown-water, commuter seaman. Her request for maritime benefits is properly denied under *Lee*, *Sellers*, and *Daughdrill*.

RESPECTFULLY SUBMITTED this 22nd day of September, 2011.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that one copy of the Brief of Respondent's State of Washington and Victoria Rapid Transit, Inc., was sent via U.S. Mail to counsel for Appellant Leigh Ann Shoffner at the following address:

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DATED this 22nd day of September, 2011, at Seattle, Washington.

Michelle Sorensen
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